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IN THE

Supreme Court of the United States

OCTOBER TERM 1945. No. 909 51

FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH,
Petitioners,
Appellants below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

FREDERIC M. P. PEARSE,
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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States.

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit on the ground that the decision of the Circuit Court of Appeals as expressed in the opinion of a majority of that Court is in conflict with the decisions of other Circuit Courts of Appeals on the same matter, and on further ground that that Court has decided a federal question in a

way which is in conflict with applicable decisions of this Court.

2. Petitioners, together with others, were indicted in the United States District Court for the District of New Jersey on an indictment containing one count which charged a conspiracy between the defendants and officers of the German Consulate in the City of New York to the end that the various defendants would violate the Alien Registration Act of 1940 (Title 8 U. S. C. Sec. 452, *et seq.*) in that they would deny, falsify, and misrepresent that they, the defendants were not members of the Nazi Party, and in so doing would defraud and obstruct the United States in obtaining accurate information as to their membership and activities in the Nazi Party, its clubs, organizations, functions and activities in the United States in violation of Title 18 U. S. C. Sec. 88. The indictment charged that the alleged conspiracy was entered into about September 1st, 1939 and continued up to the date of the filing of the indictment at the April Term 1944. However, the last overt act alleged in the indictment was December 26th, 1940, which was the latest date that any defendant filed his Alien Registration statement.

3. The case came on for trial before the trial Court and a jury in Newark, New Jersey, on November 27th, 1944. Originally thirty-one defendants were indicted. Six entered pleas of guilty, there was a dismissal as to one, a severance as to fourteen and a trial as to ten. At the trial three were acquitted, there was a mistrial as to four and the three who are petitioners herein were convicted. Petitioners Fiswick and Rudolph were each sentenced to eighteen months, and petitioner Mayer was sentenced to a year and a day imprisonment.

4. An appeal from the judgment was taken to the United States Circuit Court of Appeals for the Third Circuit, which affirmed by a divided Court the judgment of the District Court on December 10th, 1945. A petition for rehearing was filed and was denied by the Circuit Court of Appeals for the Third Circuit on January 26th, 1946.

II.

Questions Presented.

The questions presented are:

1. May a conspiracy continue after the last overt act to effect its object has been committed?

2. Are statements made by defendants, not in the presence of each other and years after the commission of the last overt act charged in a conspiracy indictment, admissible to prove the existence of the conspiracy charged, and its continuance?

III.

Statement of the Case.

The names of the three petitioners who are German Nationals, together with others, appeared on a list of names which was found among the records of the German Consulate in New York City. The list was entitled "List of Persons who have Applied for Passports". A former employee of the Consulate named Lillian Illian testified that this list had been made up from file cards of persons who

were either prospective members or members of the Nazi Party. She did not however know any of the defendants personally. She further testified that a Dr. Draeger, who was a Consular officer instructed the members and prospective members not to disclose that they were members of the Nazi Party in the registration statements required to be filed under the Alien Registration Act of 1940 (Title 8 U. S. C. Sec. 452 *et seq.*). Subsequently, but before the last registration statements were filed in December 1940, the Consul sent out letters advising the various persons on the list who had been accepted as members that they should write to the Alien Registration Division of the Department of Justice to amend their registration statements to show that they were non-resident members of the National Socialist German Labor Party.

The Court also permitted to be introduced in evidence statements made by the petitioners, made in the case of petitioner Mayer on November 23rd, 1943, in the case of petitioner Fiswick on April 29th, 1944, May 19th, 1944 and May 26th, 1944, and in the case of petitioner Rudolph on November 17th, 1943 and September 5th, 1944, as well as statements made by other defendants during the same period, as against not only the individual defendant making the statement but also as against the other petitioners and defendants, on the theory that the conspiracy as alleged in the indictment continued down to the date of the filing of the indictment.

IV.

Statutes Involved.

Title 8 U. S. C. A. Section 452(a) (in effect June 28, 1940):

"It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 451 of this title, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

Title 8 U. S. C. A. Section 453(a):

"The application for the registration and fingerprinting, or for the registration of any alien who is in the United States on the effective date of such sections may be made at any time within four months after such date."

Title 8 U. S. C. A. Section 453(b):

"No foreign government official, or member of his family, shall be required to be registered or fingerprinted under this chapter."

Title 8 U. S. C. A. Section 455(a):

"The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this chapter. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional mat-

ters as may be prescribed by the Commissioner, with the approval of the Attorney General."

Title 8 U. S. C. A. Section 457(c):

"Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted within five years after entry into the United States shall, upon the warrant of the Attorney General, be taken into custody and be deported in the manner provided in sections 155 and 156 of this title."

Title 18 U. S. C. A. Section 88:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parites to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

V.

Reasons for Allowance of Writ.

The decision of the Circuit Court of Appeals as it appears in the majority opinion, conflicts with the decisions of this Court in *Brown* v. *Elliott*, 225 U. S. 392; *United States* v. *Kissel*, 218 U. S. 601; *United States* v. *Irvine*, 98

U. S. 450 and other representative cases and authorities cited in the argument, which hold that there should be a distinction between the continuance of a crime and the continuance of the result thereof.

The minority opinion in the instant case, in the Circuit Court of Appeals, recognized this distinction while the majority opinion did not.

In a case involving a similar indictment but different defendants, tried in the Southern District of N. Y. which resulted in convictions, the convictions were set aside by the Circuit Court of Appeals for the Second Circuit for several reasons, among them being that the conspiracy charged in the indictment was a conspiracy *not* to defraud the United States but rather a conspiracy to have each defendant file false statements in violation of the Alien Registration Act. *United States* v. *Ausmeier*, 152 Fed. (2d) 349. A similar view was held by the minority opinion in the instant case while the majority opinion held otherwise.

WHEREFORE your petitioners pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals, in the said case entitled in that court: *United States of America* vs. *Ferdinand Fiswick, Jacob F. Mayer, and Fritz Gustav Rudolph*, No. 8864, October Term, 1944, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States and that

the judgment herein of the Circuit Court of Appeals be reversed by this Honorable Court, and for such other further relief as to this Court may seem proper.

FERDINAND FISWICK,
JACOB F. MAYER, and
FRITZ GUSTAV RUDOLPH,

By

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with
Petitioners.

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FERDINAND FISWICK, JACOB F. MAYER, and FRITZ GUSTAV RUDOLPH,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The majority opinion of the Circuit Court of Appeals appears following page 351 of the Record and is followed immediately by the minority opinion.

II.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under Section 240(A) of the Judicial Code, as amended by Act of February 13th, 1925, c. 299, 43 Stat. 938 (28 U. S. C. 347).

(2) The judgment of the Circuit Court of Appeals was entered December 10th, 1945. A petition for rehearing was filed and was denied January 26th, 1946.

III.

Statement of the Case.

A full statement of the case is included in the preceding petition under Title III.

IV.

ARGUMENT.

The trial court erred in holding that the conspiracy charged in the indictment continued after the last overt act was committed where the purpose of the conspiracy was to commit the same.

The conspiracy charged was to defraud the United States Government by preventing it from obtaining certain information to which it was entitled, by the defendants filing false Alien Registration Statements in the fall of

1940 and failing to disclose the membership of the individual defendants in the Nazi Party. The government introduced statements made by the defendants, including petitioners years after the filing of the registration statements for the purpose of proving the existence of the conspiracy and the defendants' part therein. These statements were admitted by the Court not only against the individual defendants making the same but also against the co-defendants on the theory that the conspiracy was a continuing one even though no positive act was committed subsequent to the filing of the Statements in December, 1940. At page 205 of the Record, the trial court made the following statement:

> "The Court: Now in order that there may be no mistake, a question has arisen which I conceive to be novel, as to whether or not there is a continuing conspiracy without a positive act; I am ruling that the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there is such continuous cooperation. That has been the determination of the Supreme Court where there was an act of commission; I am now extending it to a situation whereby cooperation may be indicated by failure to do some act to indicate a desire to bring to an end the continuing situation effected by the act previously done. Under that ruling, and in order that there may be no further mistake, I shall rule that all statements which were made by each of the defendants, although they were made after 1940, will be admissible against each of the other alleged co-conspirators. * * *"

To this ruling an exception was taken and allowed (R. 206). This ruling was in effect approved by the majority opinion in the Circuit Court of Appeals for the Third Circuit. This ruling by the trial judge, as applied to the facts in this case, we feel is directly contrary to the decisions of this Court in *United States* v. *Irvine*, 98 U. S. 450, in *United States* v. *Kissel*, 218 U. S. 601, and in *Brown* v. *Elliott*, 225 U. S. 392.

The trial court in thus holding, attempted to make the conspiracy a continuing one, whereas only the result of the conspiracy, if any existed, continued. There was no proof of continued cooperation between the defendants after the filing of the registration statements, nor was there any affirmative act done by any of the defendants after those events, that is, subsequent to December, 1940, when the last registration statements were filed. Statements by members of a conspiracy can only be binding on co-conspirators when made during the existence of the conspiracy.

Clearly if the defendants had been charged with the substantive offense of violating the Alien Registration Act of 1940, under *United States* v. *Irvine, supra*, the act would have been complete with the filing of the false registration statement. If they had been counseled, aided and abetted in committing the substantive offense, their aiders and abettor would have been in the same position as they were and the statute of limitations would have started to run with the completion of the act of filing a false statement. Why then should an indictment for conspiracy with an allegation that the conspiracy continued down to the date of the filing of the indictment (R. 10), with no proof to support it, change the basic principle enunciated in the *Irvine* case. Both the trial court and the Circuit Court of Appeals in its majority

opinion confused the result of a crime with the continuing thereof. The conspiracy charged in the indictment had no continuity of purpose beyond the filing of the false registration statements and therefore was completed by the performance of those acts. There being a distinct period of accomplishment, upon this being completed, the conspiracy, if one existed, came to an end. *Hyde* v. *United States*, 225 U. S. 368; *United States* v. *Kissel, supra.*

If the conspiracy was a continuing one, as alleged in the indictment, it ended December, 1940, and therefore the statements of petitioners and other defendants, made three or four years later, concerning their own individual activities, not only were not proof of the existence of a conspiracy but were not binding upon their alleged co-conspirators. The admission of such statements in evidence was highly prejudicial to the rights of these petitioners.

Conclusion.

Your petitioners respectfully submit that the Circuit Court of Appeals for the Third Circuit has failed to follow the applicable decisions of this Court, and that a conflict exists between its decision and the decisions of other Circuit Courts of Appeals and of this Honorable Court, and that the questions presented by the foregoing petition should be reviewed by this Honorable Court.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel
with Petitioners.